Ketua Pengarah Hasil Dalam Negeri v Rapid Growth Technology Sdn Bhd

HIGH COURT (PENANG) — CIVIL APPEAL NO PA-14–1–12 OF 2016
LIM CHONG FONG J
14 JUNE 2017

Revenue Law — Income tax — Special Commissioners — Deciding order — Appeal against — Application for relief rejected by Director General of Income Tax — Special Commissioners of Income Tax ruling that respondent entitled to reinvestment allowance — Whether deciding order of Special Commissioners of Income Tax correct in law — Whether Director General of Income Tax had any legal basis to reject respondent's application for relief under s 131(4) of the Income Tax Act 1967

The respondent ('RGTSB') filed an application to the appellant ('DGIT') under s 131(1) of the Income Tax Act 1967 ('the Act') for relief in respect of reinvestment allowance because of the error or mistake in the tax assessment for the year 2009. However, the DGIT rejected the application. RGTSB then requested the DGIT to submit the application to the Special Commissioners of Income Tax ('SCIT'). Before the SCIT, RGTSB contended that as a consequent of its business expansion, RGTSB constructed a new factory comprising of a two-storey building which included 14 items disputed by the DGIT ('disputed items') relating to the claim for reinvestment allowance. RGTSB had claimed for reinvestment allowances in its tax assessment for year 2009 save for the disputed items amounting to RM10,784,349 by reason that RGTSB complied with the Public Ruling No 2/2008 ('public ruling') issued by the DGIT. In a deciding order ('deciding order'), the SCIT held that the respondent could apply for a relief under s 131 of the Act to claim for a reinvestment allowance under Schedule 7A of the Act. It was also held by the SCIT that the appellant did not have any legal basis to dismiss RGTSB's for the said relief. The DGIT, dissatisfied with the decision of the SCIT filed a notice of appeal requiring the Special Commissioners to state a case for the opinion of the High Court pursuant to para 34 Schedule 5 of the Act. The issue that arose for determination, inter alia, were: (a) whether the deciding order of the SCIT was correct in law; and (b) whether the DGIT had any legal basis to reject RGTSB's application for relief under s 131(4) of the Act.

Held, allowing the appeal with costs:

(1) There is nothing in the Act that suggests s 131(4) of the Act cannot apply to interpretation of law. If s 131(1) of the Act can apply to an error or mistake in law due to misplaced confidence, there is no reason in

principle as to why the practice of the Director General in s 131(4) of the Act cannot also involve a matter of interpretation of law (see para 33).

(2) By the purposive construction of s 131(1) and (4) of the Act, the policy intended by the Legislature is for the taxpayer to be proactive in making challenges on interpretation of any prevailing public ruling issued by the Director General if and when the taxpayer is dissatisfied with the DGIT's interpretation of provisions of the Act in those public rulings. Otherwise, the re-active taxpayer as RGTSB herein is estopped by s 131(4) of the Act from recovering relief for error or mistake notwithstanding that the taxpayer may satisfy s 131(1) of the Act. In the circumstances, the SCIT had misconceived the law and/or erred in law. Appellate intervention was therefore justified (see paras 34–35).

[Bahasa Malaysia summary

Responden ('RGTSB') memfailkan permohonan kepada perayu ('DGIT') di bawah s 131(1) Akta Cukai Pendapatan 1967 ('Akta') bagi pelepasan berkenaan pelaburan semula elaun akibat kesilapan atau kekhilafan dalam taksiran cukai bagi 2009. Walau bagaimanapun, DGIT menolak permohonan tersebut. RGTSB kemudiannya memohon DGIT mengemukakan permohonan ini kepada Pesuruhjaya Khas Cukai Pendapatan ('SCIT'). Di hadapan SCIT, RGTSB menghujahkan bahawa berakibat daripada pengembangan perniagaannya, RGTSB membina kilang baru yang terdiri daripada bangunan dua tingkat yang termasuk 14 item yang dipertikai oleh DGIT ('item-item yang dipertikai') berkenaan tuntutan pelaburan semula elaun. RGTSB telah menuntut pelaburan semula elaun dalam taksiran cukainya pada 2009 kecuali item-item yang dipertikai berjumlah RM10,784,349 kerana RGTSB mematuhi Peraturan Am No 2/2008 ('peraturan am') yang dikeluarkan oleh DGIT. Dalam perintah keputusan ('perintah keputusan'), SCIT memutuskan bahawa responden boleh memohon pelepasan di bawah s 131 Akta untuk menuntut pelaburan semula elaun di bawah Jadual 7A Akta. Diputuskan juga oleh SCIT bahawa perayu tidak mempunyai apa-apa asas undang-undang untuk menolak RGTSB bagi pelepasan tersebut. DGIT, berpuas hati dengan keputusan SCIT, memfailkan notis rayuan mengkehendaki pesuruhjaya khas menyatakan kes bagi pendapat mahkamah di bawah perenggan 34 Jadual 5 Akta. Isu yang timbul bagi pemutusan, antara lain, adalah: (a) sama ada perintah keputusan SCIT betul di bawah undang-undang; dan (b) sama ada DGIT mempunyai asas undang-undang untuk menolak permohonan RGTSB bagi pelepasan di bawah s 131(4) Akta.

Diputuskan, membenarkan rayuan dengan kos:

(1) Tiada apa-apa dalam Akta yang mencadangkan s 131(4) Akta tidak boleh terpakai pada tafsiran undang-undang. Jika s 131(1) Akta boleh terpakai dalam kesilapan atau kekhilafan undang-undang akibat salah tanggapan

keyakinan, tiada alasan secara prinsipnya tentang kenapa amalan Ketua Pengarah dalam s 131(4) Akta juga tidak melibatkan hal perkara tafsiran undang-undang (lihat perenggan 33).

(2) Dengan pembentukan tujuan s 131(1) dan (4) Akta, polisi yang dimaksudkan oleh Badan Perundangan adalah bagi pembayar cukai untuk menjadi pro-aktif dalam mencabar tafsiran apa-apa peraturan awam yang timbul yang dikeluarkan oleh Ketua Pengarah jika dan apabila pembayar cukai tidak bersetuju dengan tafsiran DGIT terhadap peruntukan-peruntukan Akta dalam peraturan-peraturan awam sedemikian. Jika tidak, pembayar cukai reaktif seperti RGTSB diestop oleh s 131(4) Akta daripada menerima pelepasan relief bagi kesilapan atau kekhilafan walaupun pembayar cukai memenuhi s 131(1) Akta. Dalam hal keadaan ini, SCIT tersalah tanggap undang-undang dan/atau terkhilaf di bawah undang-undang. Campur tangan undang-undang adalah berjustifikasi (lihat perenggan 34–35).]

Notes

For cases on special commissioners, see 10(2) *Mallal's Digest* (5th Ed, 2015) paras 2980–2983.

Cases referred to

ABC v The Comptroller of Income Tax, Singapore [1959] 1 MLJ 162 (refd)

Arranmore Investment Co Ltd v Inland Revenue Commissioners; Carnalea Investment Co Ltd v Inland Revenue Commissioners [1973] STC 195, CA (refd)

Ben-Odeco Ltd v Powlson (Inspector of Taxes) [1978] STC 375 (refd)

Boyer Allan Investment Services Ltd (formerly Boyer Allan Investment Management Ltd) v Revenue and Customs Commissioners [2013] SFTD 73 (refd)

Carrimore Six Wheelers Ltd v Inland Revenue Commissioners [1944] 2 All ER 503, CA (refd)

Federal Express Brokerage Sdn Bhd & Ors v Malaysia Airports (Sepang) Sdn Bhd & Anor [2012] 6 MLJ 190, CA (refd)

I Investment v Comptroller-General of Inland Revenue [1975] 2 MLJ 208 (refd)

J Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (1999) MSTC 3037 (distd)

Ketua Pengarah Hasil Dalam Negeri v Firgos (Malaysia) Sdn Bhd (2013) MSTC 30-065 (refd)

Ketua Pengarah Hasil Dalam Negeri v Marigold Industries (M) Sdn Bhd (2016) MSTC 30-116 (refd)

Ketua Pengarah Hasil Dalam Negeri v Nulogitec Industries Sdn Bhd [2016] 12 MLJ 350, (HC) (refd)

Ketua Pengarah Hasil Dalam Negeri v OKA Concrete Industries Sdn Bhd (2015) MSTC 30-091 (refd)

Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformer

Manufacturer Sdn Bhd (2012) MSTC 30-039 (refd)
Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94; [1997] 1 CLJ 636, FC (refd)
Lower Perak Co-Operative Housing Society v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713, SC (refd)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetables Oils Sdn Bhd and another appeal [2005] 3 MLJ 97; [2004] 2 CLJ 265, FC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)
Riverstone Resources Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2013) MSTC 10-042 (refd)
Rose Smith & Co, Ltd v The Commissioners of Inland Revenue 17 TC 586, HC (refd)

Legislation referred to

Finance Act 1923 [UK] s 24
Finance Act 1998 Schedule 19, para 45
Income Tax Act 1967 ss 131, 131(1), (4), 138A, Schedule 5, para 34, Schedule 7A
Interpretation Acts 1948 and 1967 s 40(1)
Taxes Management Act 1970 [UK] s 33(2)

Duna bt Mohd Isa (Legal Department, Inland Revenue Board of Malaysia) for the appellant.
S Saravana Kumar (Lee Hishammuddin Allen & Gledhill) for the respondent.

Lim Chong Fong J:

INTRODUCTION

[1] This is another appeal of the Director General of Income Tax by way of case stated against the deciding order of the Special Commissioners of Income Tax that came before me after *Ketua Pengarah Hasil Dalam Negeri v Nulogitec Industries Sdn Bhd* [2016] 12 MLJ 350.

[2] The appellant herein is the Director General of Income Tax ('DGIT') under the Income Tax Act 1967 ('the Act') and the respondent is the taxpayer. The appellant was the appellant before the Special Commissioners of Income Tax. For convenience, I will address the appellant and appellant as DGIT and RGTSB respectively here.

[3] In the deciding order dated 8 December 2016 ('deciding order'), the Special Commissioners of Income Tax stated as follows:

ADALAH DIPUTUSKAN DENGAN SEBULAT SUARA bahawa Perayu boleh memohon untuk mendapatkan relif di bawah seksyen 131(1) Akta Cukai Pendapatan 1967 bagi menuntut elaun pelaburan semula di bawah jadual 7A Akta Cukai Pendapatan 1967 berkaitan dengan item-item yang tidak dituntut oleh Perayu;

ADALAH DIPUTUSKAN JUGA SECARA SEBULAT SUARA bahawa pihak Responden tidak mempunyai apa-apa asas perundangan untuk menolak permohonan Perayu untuk mendapatkan relif di bawah seksyen 131(1) Akta Cukai Pendapatan 1967;

ADALAH DIPUTUSKAN JUGA SECARA BULAT SUARA bahawa Perayu berhak untuk menuntut elaun pelaburan semula di bawah Jadual 7A Akta Cukai Pendapatan 1967 di dalam tahun taksiran 2009 bagi item-item yang tidak dituntut sebelum ini seperti berikut:

Item-item Yang Tidak Dituntut	Perbelanjaan Modal
Lobby	RM220,802.60
Administrative office	RM1,995,010.73
Walkways	RM86,592.68
Canteen	RM289,854.39
Surau	RM128,409.86
Toilets	RM156,977.75
Filing production	RM2,148,414.20
Injection moulding production	RM2,280,924.93
Assembly production	RM1,413,630.86
Warehouse	RM1,711,345.00
Guard house	RM105,660.84
Utility building consisting of switch room	RM219,894.38
Production waste depot	RM31,097.96
Crushing room	RM87,720.82
Jumlah	RM10,784,349.00

MAKA DENGAN INI ADALAH DIPERINTAHKAN bahawa rayuan ini dibenarkan;

DAN DIPERINTAHKAN SELANJUTNYA bahawa notis-notis taksiran yang berkaitan dengan rayuan ini dipinda sejajar dengan keputusan di atas.

[4] The DGIT was dissatisfied with the decision of the Special Commissioners of Income Tax and filed a notice of appeal dated 23 October 2015 requiring the Special Commissioners to state a case for the opinion of the High Court pursuant to para 34 Schedule 5 of the Act.

[5] In consequence the appeal by way of special case was filed here to address the question as to whether based on the facts as stated, the decision order of the Special Commissioners of Income Tax is correct in law.

[6] After reading the cause papers and written submissions filed by the parties, I heard oral arguments of counsel on 2 May 2017 and 18 May 2017. I thereafter adjourned the matter for deliberation particularly on the intricate legal points raised by counsel.

[7] Now having duly deliberated, I furnish my decision hereinbelow together with the supporting grounds.

SALIENT FACTS

[8] These are the salient fasts that were found by the Special Commissioners of Income Tax:

(a) RGTSB is a Malaysian incorporated company;

(b) RGTSB is in the manufacturing and sales business of plastic air freshener dispensers and plastic parts since 1997 at its factory situated at Lot 170 and 170A, Jalan Perindustrian Bukit Minyak, Kawasan Perindustrian Bukit Minyak, Pulau Pinang;

(c) on 3 September 2012, RGTSB filed an application to the appellant under s 131(1) of the Act for relief in respect of reinvestment allowance because of error or mistake in the tax assessment for the year 2009. The application was supported by the affidavit of Ng Choon Keat;

(d) the DGIT on 14 February 2013 rejected RGTSB's application;

(e) consequently, RGTSB on 21 May 2013 requested the DGIT to submit RGTSB's aforesaid application to the Special Commissioners of Income Tax. The application was registered as Application No PKCP(R) 173/2013;

(f) before the Special Commissioners of Income Tax, RGTSB contended that as the result of its business expansion, RGTSB constructed a new factory comprising of a two storey building which included fourteen items disputed by the DGIT ('disputed items') relating to the claim for reinvestment allowance;

(g) RGTSB has claimed for reinvestment allowances in its tax assessment for year 2009 save for the disputed items amounting to RM10,784,349 by reason that RGTSB complied with the Public Ruling No 2/2008 ('public ruling') issued by the DGIT. Based on the public ruling, RGTSB was only entitled to relief to claim for reinvestment allowance for the production area of the new buildings. Thus, RGTSB did not claim for the disputed items which didn't constitute the production area of the new building. They were nevertheless necessities in the running of RGTSB's operations that led to its increase in business turnover as well as production output from 2007–2011;

(h) RGTSB subsequently decided to apply for relief to claim reinvestment allowance for these disputed items after becoming aware of later Special Commissioners of Income Tax and judicial decisions relating to relief claimed for reinvestment allowance under Schedule 7A of the Act; and

(i) the DGIT however relied on s 131(4) of the Act to deny RGTSB's application.

CONTENTIONS OF THE PARTIES

[9] Before the Special Commissioners of Income Tax, these were the issues put forth by the parties, to wit:

(i) whether RGTSB is entitled to claim for reinvestment allowance under Schedule 7A of the Act in respect of the disputed items in the year of assessment 2009?

(ii) whether RGTSB may apply for relief under s 131(1) of the Act to claim for reinvestment allowance under Schedule 7A of the Act in respect of the disputed items? and

(iii) whether the DGIT has any legal basis to reject RGTSB's application for relief under s 131(1) of the Act?

[10] Before me, the parties do not seriously dispute the Special Commissioners of Income Taxs' affirmative decision in respect of issues (i) and (ii).

[11] The principal contentions of the parties concern issue (iii) where the Special Commissioners of Income Tax found in the negative against the DGIT. The DGIT relied on s 131 especially s 131(4) of the Act which reads:

131 Relief in respect of error or mistake

(1) If any person who has paid tax for any year of assessment alleges that an assessment relating to that year is excessive by reason of some error or mistake in a return or statement made by him for the purposes of this Act and furnished by him to the Director General prior to the assessment becoming final and conclusive, he may within five years after the end of the year of assessment within which the assessment was made make an application in writing to the Director General for relief.

(2) On receiving an application under subsection (1) the Director General shall inquire into the matter and, subject to this section, shall give by way of repayment of tax such relief in respect of the alleged error or mistake as appears to him to be just and reasonable.

(3) In determining any application under this section the Director General shall have regard to all the relevant circumstances of the case and in particular —

(a) shall consider whether the granting of relief would result in the exclusion from charge to tax of income of the applicant; and

(b) for that purpose may take into consideration the chargeability of the applicant for years of assessment other than the year to which the application relates and assessments made upon him for those years.

(4) No relief shall be given under this section in respect of an error or mistake as to the basis on which the chargeability of the applicant ought to have been computed if the return or statement containing the error or mistake was in fact made on the basis of, or in accordance with, the practice of the Director General generally prevailing at the time when the return or statement was made.

(5) An application under subsection (1) shall be as nearly as may be in the same form as a notice of appeal under section 99; and, where the applicant is aggrieved by the Director General's decision on the application —

(a) the applicant may within six months after being informed of the decision request the Director General in writing to send the application forward to the Special Commissioners;

(b) the Director General shall within three months after receiving the request send the application forward as if he were sending an appeal forward pursuant to section 102; and

(c) the application shall thereupon be deemed to be an appeal and shall be disposed of accordingly.

The DGIT contended that the public ruling was the prevailing practice of the DGIT; hence RGTSB's claim must accordingly be excluded as plainly provided by statute.

[12] However, RGTSB in retort replied that the public ruling cannot constitute practice and s 131(4) of the Act is therefore inapplicable.

FINDINGS OF THE COURT

[13] My function in an appeal by way of case stated from the Special Commissioners of Income Tax is set out in the Supreme Court case of *Lower Perak Co-Operative Housing Society v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713 where Edgar Joseph Jr SCJ held as follows with emphasis added by me:

> First of all, it would be pertinent to say that in considering this appeal we have kept in the forefront of our minds the much-quoted principles enunciated by Lord Radcliffe in *Edwards v Bairstow and Harrison*, 1 regarding the duty of the court when hearing appeals from commissioners in tax cases. It will be recalled that in that case what Lord Radcliffe said (at pp 35–36) was this:
>
> I think that the true position of the court in all these cases can be shortly stated.

> If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. *When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination.* Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

In *Chua Lip Kong v Director-General of Inland Revenue 2*, Lord Diplock when delivering the unanimous judgment of the Privy Council in a tax appeal had occasion to refer, with approval, to the observations of Lord Radcliffe aforesaid in the following terms:

> ... it is plainly wrong in law; or else it is a conclusion of mixed fact and law that no reasonable special commissioners could have reached if they had correctly directed themselves in law. Whichever way it is looked at, it falls within the well-known principle laid down by Viscount Radcliffe in *Edwards v Bairstow*. It is a conclusion or decision of the special commissioners which the High Court was entitled to and ought to have set aside.

And, in *Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue 3*, when delivering the unanimous judgment of the Privy Council, Lord Oliver indicated in what circumstances a court might interfere with the decision of the special commissioners. Here is what His Lordship said (at p 169):

> The special commissioners are, of course, as the Federal Court rightly observed, the judges of fact, but in finding the facts and drawing inferences of secondary fact from them, they must not misdirect themselves and they must draw conclusions from facts having probative value. In Their Lordships' judgment, the special commissioners in this case both misdirected themselves by reaching conclusions inconsistent with primary facts found by them and drew inferences from matters which were of no probative value in supporting their conclusions.

In Commissioners of *Inland Revenue v Fraser 4*, Lord President Normand said this

(at p 501):

> Then the commissioners, on consideration of the facts and arguments submitted to them, decided by a majority that an adventure in the nature of trade had not been carried on; that an investment had been made and subsequently realized, and that the profit was not assessable to income tax. It is obvious from the way in which the commissioners have stated their conclusion that they were quite aware that they were not stating something in the nature of a primary fact but were stating a conclusion into which argument upon the construction of the Income Tax Act had entered. The respondent's counsel maintained, however, that that finding was a finding in fact and, as such, was not reviewable by this court. I think we have jurisdiction to entertain the question at law, which is whether the majority of the commissioners were warranted on the evidence in determining as they did. At the narrowest it is always open to this court in a stated case to review a finding in fact on the ground that there is no evidence to support it. That has been stated again and again.

See also *I Investment v Comptroller-General of Inland Revenue* [1975] 2 MLJ 208.

[14] Put simply, the High Court may intervene on the following grounds:

(i) there is a misconception of law;

(ii) the conclusion of law cannot be supported by the primary facts; or

(iii) the conclusion of mixed fact and law that no reasonable Special Commissioners of Income Tax could have reached if they have correctly directed themselves.

[15] In this regard, issue (i) has already been settled by several cases both of the Special Commissioners of Income Tax and the High Court namely *Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformer Manufacturer Sdn Bhd* (2012) MSTC 30-039, *Riverstone Resources Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2013) MSTC 10-042 and *Ketua Pengarah Hasil Dalam Negeri v Firgos (Malaysia) Sdn Bhd* (2013) MSTC 30-065, *Ketua Pengarah Hasil Dalam Negeri v OKA Conrete Industries Sdn Bhd* and *Ketua Pengarah Hasil Dalam Negeri v Marigold Industries (M) Sdn Bhd* (2016) MSTC 30-116 that reinvestment allowance may also be claimed for non production area of a factory. I too have held likewise in *Ketua Pengarah Hasil Dalam Negeri v Nulogitec Industries Sdn Bhd*.

The Special Commissioners of Income Tax relied on several of the aforementioned cases in its decision order.

[16] In the premises, I hold that the finding of the Special Commissioners of Income Tax is correct on this issue in law.

[17] As to issue (ii), it is plain that 'mistake' is not defined in the Act. In the deciding order, the Special Commissioners of Income Tax referred to the decision of *J Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (1999) MSTC 3037 where the meaning of 'error' and 'mistake' in s 131(1) were held to mean the following in *Black's Law Dictionary* with emphasis added by me:

> Error — A mistaken judgment or incorrect belief as to the existence or effect of matters of fact, or a false, or *mistaken conception or application of law*. Such a mistake or false conception or application of the law to the facts of a cause as will furnish ground for a review of the proceedings upon a writ of error. A mistake of law, or false or irregular application of it, such as vitiates the proceedings and warrants the reversal of the judgment. An act involving a departure from truth or accuracy; a mistake; an inaccuracy; as, an error of calculation.
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> Mistake — Some unintentional act, omission, or *error arising from ignorance*, surprise, imposition or *misplaced confidence*. A state of mind not in accord with reality. *A mistake exists when a person, under some erroneous conviction of law* or fact, does, or omits to do, some act which, *but for the erroneous conviction, he would not have done or omitted*. It may arise either from unconsciousness, ignorance, forgetfulness, imposition or *misplaced confidence*.

[18] The Special Commissioners of Income Tax found that RGTSB did not claim reinvestment allowance on the disputed items because RGTSB placed its confidence and reliance on the public ruling at the time of submission of its tax return for the year of assessment 2009. In the Decision Order, the Special Commissioners of Income Tax held as follows:

> 10.1(n) Melalui keterangan yang dikemukakan oleh saksi-saksi Perayu, Mahkamah berpuas hati bahawa jika tidak kerana KU yang berkenaan, Perayu akan membuat tuntutan elaun pelaburan semula ke atas Item-Item Yang Dipertikaikan bagi tahun taksiran 2009. Oleh Yang demikian, Mahkamah berpendapat bahawa Perayu telah melakukan kesilapan apabila tidak membuat tuntutan elaun pelaburan semula kerana meletakkan kepercayaan dan kebergantungan kepada KU yang berkenaan.
>
> 10.1(o) Mahkamah bersetuju dengan hujahan Perayu bahawa sebagai pembayar cukai yang baik, Perayu perlu mengikut arahan dalam KU yang dikeluarkan oleh Responden sebagai badan yang mengawal selia hal-hal percukaian dalam Negara ini dan kegagalan Perayu menuruti KU boleh menyebabkan Perayu dikenakan penalti.
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> ...
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> 10.1(q) Mahkamah turut merujuk kepada kes *Deutche Morgan Grenfall Group PLC v Inland Revenue & Anor* [2006] BTC 781 di mana telah dinyatakan bahawa —
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> > At all material times prior to the determination of the European Court in the *Hoechst* case, I believe that the UK statute denying the ability to make a group income election was the law and that I was bound to act in accordance with this law ... It did not occur to me that I could ignore the law as it stood for simple reason that the law is the law, just because another taxpayer challenge the law that did not mean I could or should ignore it.
> >
> > ...

10.1(s) Mahkamah mendapati hakim berkenaan seterusnya menyatakan —

> ... it is important to bear in mind that special nature of mistake, namely that it was deemed to have been made because of the retrospective operation of a later decision of the Court of Justice ... In this case, however, the true state of affairs was not discovered until the Court of Justice pronounced its judgment ... they could not have discovered the truth because the truth did not yet exist. In my opinion, therefore, the mistake was not reasonably discoverable until after the judgment had been delivered.

...

10.1(u) Oleh yang demikian atas imbangan barangkali, Mahkamah berpendapat bahawa Perayu telah memenuhi kriteria yang diperlukan dalam seksyen 131(1) ACP 1967 untuk diberikan relif yang dipohon.

[19] I observed that in the Federal Court case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393, Gopal Sri Ram JCA (later FCJ) held as follows with emphasis added by me:

18. As was stated by the Court of Appeal in its judgment in *Abdillah bin Labo Khan v Public Prosecutor* [2002] 3 MLJ 298 at p 304:

> *It is a fundamental principle of adjudicative jurisprudence that all judgments of a court are retrospective in effect* ...

[20] In the premises, I hold that the finding of the Special Commissioners of Income Tax is again correct on this issue in law. I am satisfied RGTSB has successfully shown that its assessment of 2009 was wrong and must be put right following *ABC v The Comptroller of Income Tax, Singapore* [1959] 1 MLJ 162 and *Ben-Odeco Ltd v Powlson (Inspector of Taxes)* [1978] STC 375. In other words, it is also my view that s 131(1) of the Act applied to situations of error or mistake because of misplaced confidence of the taxpayer on the law such as the interpretation of the Act at the material time of submission of the tax return.

[21] Moving to issue (iii) on whether s 131(4) negatives RGTSB's entitlement under s 131(1) of the Act, the Special Commissioners of Income Tax held as follows in the decision order:

10.2(c) Responden menghujahkan bahawa KU tersebut merupakan satu-satunya otoriti berkaitan elaun pelaburan semula yang terpakai pada masa itu. Semasa soal utama, Saksi Responden RW1 menyatakan bahawa KU tersebut adalah amalan yang dipraktikkan dan diterima pakai pada masa yang material.

10.2(d) Walau bagaimanapun, Mahkamah juga membuat penilaian terhadap keterangan RW1 semasa pemeriksaan balas, yang mana beliau telah bersetuju bahawa KU berkenaan hanya merupakan panduan kepada pihak awam serta

pegawai-pegawai LHDN mengenai interpretasi Ketua Pengarah Hasil Dalam Negeri terhadap sesuatu undang-undang cukai bukannya sebagai amalan. RW1 seterusnya bersetuju bahawa sekiranya pihak Responden berniat agar KU berkenaan mengandungi amalan untuk diguna pakai pada masa itu, pihak Responden sudah pasti menyatakan perkara tersebut di dalam KU. RW1 bersetuju tiada di mana-mana dalam KU yang menyatakan sedemikian.

10.2(e) RW1 juga bersetuju dengan cadangan peguam Perayu bahawa beliau telah silap apabila menolak permohonan Perayu mengikut subseksyen 131(4) ACP 1967 kerana KU bukanlah suatu amalan tetapi hanya merupakan suatu garis panduan dan interpretasi pihak Responden berkenaan undang-undang cukai.

[22] According to the DGIT, the public ruling was issued pursuant to s 138A of the Act which reads:

138A Public Ruling

(1) The Director General may at any time make a public ruling on the application of any provision of this Act in relation to any person or class of persons, or any type of arrangement.

(2) The Director General may withdraw, either wholly or partly, any public ruling made under this section.

(3) Notwithstanding any other provision of this Act, where a public ruling in subsection (1) applies to any person in relation to an arrangement and the person applies the provision in the manner stated in the ruling, the Director General shall apply the provision in relation to the person and the arrangement in accordance with the ruling.

The preamble of the public ruling provides as follows with emphasis added by me:

Director General's Public Ruling

A Public Ruling as provided for under section 138A of the Income Tax Act 1967 is issued for the purpose of providing guidance for the public and officers of the Inland Revenue Board Malaysia. *It sets out the interpretation of the Director General of Inland Revenue in respect of the particular tax law, and the policy and procedure that are to be applied.*

[23] Consequently the DGIT submitted that the public ruling is plainly the DGIT's 'practice' at that material time; hence RGTSB is accordingly prohibited from seeking relief for the reinvestment allowance by virtue of the clear provision in s 131(4) of the Act.

[24] On the other side, RGTSB strenuously submitted that 'practice' was discussed in *J Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* wherein the Presiding Special Commissioner Augustine Paul (later FCJ) held as follows:

A We must add that, in our opinion, the practice referred to in the subsection must be confined to matters pertaining to the administrative machinery of putting into effect the terms of the Act and not to matters that will result in violation of explicit provisions of the Act.

B As the result, RGTSB submitted that the 'practice of the Director General generally prevailing' in s 131(4) of the Act does not include questions of interpretation of the law or error of law committed by the Inland Revenue Department. Put it in another way, it is limited to administrative matters only.

C **[25]** In addition, RGTSB submitted that s 131(4) of the Act originated from s 33(2) of the Taxes Management Act 1970 (as well as its predecessor s 24 of the Finance Act 1923) of the United Kingdom which reads:

D Provided that no relief shall be given under this section in respect of an error or mistake as to the basis on which the liability of the claimant ought to have been computed where the return was in fact made on the basis or in accordance with practice generally prevailing at the time when the return was made.

In the English case of *Rose Smith & Co, Ltd v The Commissioners of Inland Revenue* 17 TC 586, Finlay J held as follows:

E ... indeed, I think, when the structure of the section is looked at, it appears that the proviso to the second sub-section raises a question of fact for the Commissioners which is in the nature of a preliminary question of fact. They have to find that question of fact and, if they find it a particular way in favour of the subject, then they are to go on and enquire into the proper method of computation of the profits or F income and to give such relief, if any, as they conceive to be just. The meaning of that seems to me to be this, the first thing is to ascertain — if any point arises with regard to it – whether there has been this practice. That is a pure question of fact and a question of fact which is, as I read it, to be determined by the Commissioners.

G See also *Carrimore Six Wheelers Ltd v Inland Revenue Commissioners* [1944] 2 All ER 503 and *Arranmore Investment Co Ltd v Inland Revenue Commissioners; Carnalea Investment Co Ltd v Inland Revenue Commissioners* [1973] STC 195.

[26] In the more recent English case of *Boyer Allan Investment Services Ltd (formerly Boyer Allan Investment Management Ltd) v Revenue and Customs* H *Commissioners* [2013] SFTD 73, Judge Berner and Mr Marsh held in respect of the current para 45 of Schedule 19 of the Finance Act 1998 which reads:

No discovery assessment for an accounting period for which the company has delivered a company tax return, or discovery determination, may be made if —

I (a) the situation mentioned in paragraph 41(1) or (2) is attributable to a mistake in the return as to the basis on which the company's liability ought to have been computed; and

(b) the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

As follows:

> [34] ... The twin purposes of simplicity and finality, in our view, demand both certainty and clarity in the application of the relevant provisions. A practice within para 45(b) must be capable of being readily ascertained; otherwise it would not be one of that was capable of general acceptance. And in order to be readily ascertainable, the practice must have substance (in the sense of not being inchoate), and be sufficiently precise and devoid of uncertainty as to its application. In particular, such as practice would not exist if it was equivocal or dependent on the ascertainment of facts, except where the criteria for its application by reference to the facts were themselves understood with a sufficient degree of precision so as the make the practice one that can be readily applied to in any given case.
>
> [35] A practice of this nature will be readily ascertainable by interested parties in a number of possible ways. There may be published statement of practice, concession or otherwise by HMRC. That process might be more or less formal. But publication is not a necessary ingredient. A practice, albeit unpublished, will equally be ascertainable if it can be readily discovered from enquiry of HMRC themselves or advice sought from a practitioner in the field, particularly where the practice arises in a specialised area ...

[27] RGTSB therefore submitted that the Special Commissioners of Income Tax were correct in not applying s 131(4) to RGTSB's error or mistake that had arisen pursuant to s 131(1) of the Act.

[28] As to the proper approach in interpreting taxing statute, Steve Shim CJ (Sabah and Sarawak) held as follows in the Federal Court case of *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetables Oils Sdn Bhd and another appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265 with emphasis added by me:

> Now, the Court of Appeal, in the present case, had expressly held that the provisions of a taxing statute should be construed strictly without regard to the purpose, object or intent of the statute, relying, quite obviously, on the Supreme Court case of *National Land-Finance Co-operative v Director-General of Inland Revenue* [1994] 1 MLJ 99; [1993] 4 CLJ 339 *when Gunn Chit Tuan CJ (Malaya) said:*
>
> > There are ample authorities to show that the courts have refused to adopt a construction of a taxing statute which would impose liability when doubt exists. In *Re Micklewait*, it was held that a subject was not to be taxed without clear words. We realise that revenue from taxation is essential to enable the government to administer the country and that courts should help in the collection of taxes whilst remaining fair to taxpayers. Nevertheless, we should remind ourselves of the principle of strict interpretation as stated by Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners* ... It has been said by the Judicial Committee in *Oriental Bank Corp v Wright* that the intention to impose a charge upon a subject must be shown by clear and unambiguous language ...
>
> With respect, the principle of strict interpretation of statutes enunciated by Rowlatt J could not be regarded as the locus classicus on the issue. Indeed as long

A ago as 1899, Lord Russell of Killowen CJ took a different approach in *AG v Carlton Bank* [1899] 2 QB 158, when he said, inter alia:

> *I see no reason why special canons of construction should be applied to any Act of Parliament and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of a court is, in my opinion, in all cases the same; whether the Act to be construed relates to taxation or any other subject, viz to give effect to the intention of the Legislature ...*

In *Luke v IRC* [1963] AC 557, Lord Reid in the House of Lords, echoed similar views. And much later, Lord Wilberforce expanded the principle in *WT Ramsay Ltd v Inland Revenue Commission* [1982] AC 300 when he said as follows:

> *A subject is only to be taxed on clear words, not on 'intendment' or on the 'equity' of an Act ... What are 'clear words' is to be ascertained on normal principles; these do not confine the courts to literal interpretation. They may, indeed should, be considered in the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded ...*

This is known as the Ramsay Principle. While clear words are needed before a tax can be imposed, what those words are would be interpreted in line with the purposive approach. Undoubtedly, in the United Kingdom, there is currently a more pronounced shift from the strict literal interpretation of a taxing statute. The Ramsay Principle of statutory interpretation seems to have entrenched itself; (see *Pepper v Hart* [1993] AC 593). In Malaysia, that principle should apply and it must be applied in consonance with s 17A of the Interpretation Acts 1948/1967 which stipulates:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object ...

It is pertinent to note that s 17A was a recent amendment under the Interpretation (Amendment) Act 1997 (Act A996) and became effective on 25 July 1997. This would be after the *National Land Finance Co-operative* (supra). In my view, the law is now clear beyond doubt. Section 17A above enjoins the purposive approach to statutory interpretation. This applies to all statutes including taxing statues. That answers the second question posed.

Furthermore, Gopal Sri Ram JCA (later FCJ) held as follows in the same case:

> The correct approach to be adopted by a court when interpreting a taxing statute is that set out in the advice of the Privy Council delivered by Lord Donovan in *Mangin v Inland Revenue Commissioner* [1971] AC 739:
>
> First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices. As Turner J said in his (albeit dissenting) judgment in *Marx v Inland Revenue Commissioner* [1970] NZLR 182 at 208, moral precepts are not applicable to the interpretation of revenue statutes.

> Secondly, '… one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'. (Per Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at 71, approved by Viscount Simons LC in *Canadian Eagle Oil Co Ltd v Regeim* [1945] 2 All ER 499; [1946] AC 119.)
>
> Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.
>
> Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.

[29] In the more recent Court of Appeal case of *Federal Express Brokerage Sdn Bhd & Ors v Malaysia Airports (Sepang) Sdn Bhd & Anor* [2012] 6 MLJ 190, Ramli Ali JCA (now FCJ) held as follows:

> [16] It is well settled principle of law that imposition any form of tax, duty, charge, levy, fee or other forms of financial obligations on any person must be expressly provided for in a statute passed by the Parliament or the relevant legislative body. Such imposition must be expressed in plain and unambiguous language in the particular statute.

[30] First and foremost, I noted that the provisions in the United Kingdom statutes referred by RGTSB are not identical with that in the Act albeit the Act might have originated therefrom. In the United Kingdom statutes, the relevant phrase is 'practice generally prevailing at the time' whereas the applicable provision in the Act is 'practice of the Director General generally prevailing at the time'. It is a significant difference. 'Practice' based on the United Kingdom statute is wider and would depending on its context include practice of the taxpayer or even taxpayers generally besides Her Majesty's Revenue & Customs. The United Kingdom cases must thus be read with circumspection.

[31] It is trite law in interpretation of statute that very word in the statute must be given effect as held in *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94; [1997] 1 CLJ 636 wherein Gopal Sri Ram JCA (later FCJ) held as follows:

> Parliament does not legislate in vain by the use of meaningless words and phrases, and prima facie every word appearing in an Act must bear some meaning. A judicial interpreter is therefore not entitled to disregard words used in a statute or treat them as superfluous or insignificant.

The 'practice of the Director General' in its ordinary meaning in the Act, must in my opinion, surely include the public ruling which formed the policy and procedure of the DGIT as stated in the preamble of the public ruling itself.

Policy and procedure is synonymous with practice to me and RW1 has confirmed so under examination-in-chief before the Special Commissioners of Income Tax. The public ruling has been the practice uniformly applied to taxpayers on the interpretation of Schedule 7A of the Act and there is no evidence led by RGTSB that it was otherwise. As held in *Boyer Allan Investment Services Ltd (formerly Boyer Allan Investment Management Ltd) v Revenue and Customs Commissioners* practice may include published statements by HMRC. The public ruling is likewise a published statement issued by the DGIT pursuant to s 138A of the Act on the interpretation and application of Schedule 7A of the Act. This is permissible pursuant to s 40(1) of the Interpretation Acts 1948 and 1967 being powers that are reasonably necessary to enable the DGIT to enforce the Act.

I am nonetheless aware RW1 has conceded that the public ruling is a set of guidelines under cross examination before the Special Commissioners of Income Tax. They seemed to have attached too much, if not, the entire weight on this concession in the decision order which is to my mind erroneous. Though the public ruling may also be guidelines but I think that does derogate from the fact it is in nature the practice of the Director General. The difference, if any, is merely semantics.

[32] I have also carefully reviewed the case of *J Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* relied by RGTSB that practice is limited to administrative matters only but not interpretation of law. It is my view that the facts in issue in that case are plainly contrastable with those herein. The facts as well as the dicta of Presiding Special Commissioner Augustine Paul therein relate to the issue of assessment on the same income twice for the same period because of two sets of accounts submitted; hence the mistake therein. He said as follows:

> We would have readily agreed with the Respondent in his rejection of the second set of accounts if it had been shown to have been formulated in a manner which is at variance with the requirements of the Act. However there was no such evidence. On the contrary, the available evidence shows that it conforms with the requirements of the Act. We interpolate to add that the evidence of SR1 is insufficient to support the practice if any, existing about ten years before she came into the scene for the purpose of s 131(4). We must add that, in our opinion, the practice referred to in the subsection must be confined to matters pertaining to the administrative machinery of putting into effect the terms of the Act and not to matters that will result in express violation of explicit provisions of the Act. In any event, no argument was advanced by the Respondent to suggest that he was relying on the subsection as a defence ...

The reference to s 131(4) of the Act is thus unnecessary therein and hence obiter. In any event, it was made in the context of facts that neither concerned statutory interpretation of the Act nor a public ruling issued under s 138A of the Act. The dicta is confined to the special facts of the case rather than of general application.

[33] Be that as it may, there is nothing in the Act that suggests s 131(4) of the Act cannot apply to interpretation of law. It is my view that if s 131(1) of the Act can apply to an error or mistake in law due to misplaced confidence, there is no reason in principle as to why the 'practice of the Director General' in s 131(4) of the Act cannot also involve a matter of interpretation of law.

[34] By the purposive construction of ss 131(1) and 131(4) of the Act, I am of view that the policy intended by the legislature is for the taxpayer to be proactive in making challenges on interpretation of any prevailing public ruling issued by the Director General if and when the taxpayer is dissatisfied with the DGIT's interpretation of provisions of the Act in those public rulings. The pro-active challenges relating to the interpretation of Schedule 7A of the Act took place successfully in *Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformer Manufacturer Sdn Bhd*, *Riverstone Resources Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* etc. Otherwise, the re-active taxpayer as RGTSB herein is estopped by s 131(4) of the Act from recovering relief for error or mistake notwithstanding that the taxpayer may satisfy s 131(1) of the Act.

[35] In the circumstances, I hold that the Special Commissioners of Income Tax had misconceived the law and/or erred in law in respect of issue (iii) and appellate intervention by the court is therefore justified here.

CONCLUSION

[36] For the foregoing reasons, the appeal is hereby allowed with costs of RM4,000. The decision order is set aside.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor